Supreme Court, U.S.
FILED
DEC 20 1994
OFFICE OF THE CLERK

No. 94-801

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

STATE OF ARIZONA,

Petitioner,

-vs-

CHRISTOPHER R. BURKETT,

Respondent.

ON WRIT OF CERTIORARI TO

THE ARIZONA COURT OF APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

CAROL A. CARRIGAN
Deputy Public Defender
Maricopa County Public Defender
132 South Central, Suite 6
Phoenix, Arizona 85004
Telephone: (602) 506-8220

Counsel for **RESPONDENT**

SUMMARY OF ARGUMENT

This Court has no jurisdiction under 28 U.S.C. § 1257(a) because there is no case or controversy; the question presented by the Petitioner is unripe, and the decision of the Arizona Court of Appeals was based upon adequate and independent state grounds. In all events, the speedy trial provisions of the Sixth Amendment should apply through sentencing.

ARGUMENT

The Arizona Court of Appeals held below that a citizen's right to a speedy trial applies through to the sentencing stage of proceedings, pursuant to the Sixth Amendment *and* pursuant to Article 2, § 24 of the Arizona Constitution.[1] Petition, Appendix A at page 21a.

The State of Arizona has petitioned this Court for certiorari asserting that jurisdiction lies under 28 U.S.C. § 1257(a), which gives this Court jurisdiction ". . . where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States." Specifically,

---

[1] Article 2 § 24 of the Arizona Constitution provides:
"*In criminal prosecutions, the accused shall have the right* to appear and defend in person, and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, *to have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed*, and the right to appeal in all cases; and in no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed (Emphasis added)."

Arizona claims the Court is presented with a ripe Sixth Amendment question. Petition, at pages 2 and 3.

Respondent disagrees. Burkett submits this Court has no jurisdiction because there is no genuine case or controversy; the question presented by the Petitioner is unripe; and because the decision of the Arizona Court of Appeals was based upon adequate and independent state grounds. However, in all events Burkett asserts the Sixth Amendment right to speedy trial extends through to sentencing.

Burkett made the assertion in the trial court that his right to a speedy trial carried through to sentencing; however, the trial court never reached that question. Petition, Appendix A, at page 17a. Rather, it dismissed the case on other grounds. Id. at pages 1a and 2a. Petitioner then appealed. The Arizona Court of Appeals reversed the trial court and found that the right to a speedy trial carried through to sentencing, pursuant to the Sixth Amendment *and* pursuant to Article 2, § 24 of the Arizona Constitution. Id. at page 21a. The case was therefore remanded to the trial court for a hearing to determine whether Burkett's speedy trial rights were violated by the more than two-year delay in his sentencing. Id. at pages 2a-3a. The Arizona Supreme Court later denied review, leaving as the final word in the matter the opinion of the Arizona Court of Appeals, which remanded to the trial court.

There is no case or controversy and the question is unripe.

Among other attributes, federal jurisdiction under Article III, Section 2 of the United States Constitution requires a federal

controversy. Although the Arizona Court of Appeals found the Sixth Amendment right to speedy trial carries through to sentencing, there is no controversy here because no court has found that Burkett's Sixth Amendment rights have been violated. Until there is a hearing, then, no controversy will exist.

Burkett therefore asserts that Arizona is requesting a mere advisory opinion on a hypothetical question, which is beyond the jurisdiction of the federal courts, United States Nat. Bank of Oregon v. Independent Ins. Agents of America, ____ U.S. ____, 113 S.Ct. 2173 (1993); Preiser v. Newkirk, 422 U.S. 395, 401 (1975).

Burkett also submits the case is unripe. The ripeness doctrine shuns premature judicial involvement by the Court in abstract disagreements premised on future contingencies which may not occur as anticipated, or may not come to pass at all, Reno v. Catholic Social Services, Inc., ____ U.S. ____, 113 S.Ct. 2485 (1993); Flast v. Cohen, 392 U.S. 83, 97 (1975). The trial court might determine Burkett's rights were not violated, or, if violated, that he suffered no prejudice and is not entitled to relief. Until there is a decision on the concrete rights of these parties, the matter is unripe for resolution.

The case was decided on adequate independent state grounds.

This Court lacks jurisdiction to review a state court's resolution of an issue of federal law if the state court's determination rests on an adequate and independent state ground, Sochor v. Florida, ____ U.S. ____, 112 S.Ct. 2114, 2119 (1992); Michigan v. Long, 463 U.S. 1032, 1041 (1983); Herb v. Pitcairn, 324

U.S. 117, 125-126 (1945). Burkett asserts the Arizona Court of Appeals expressly stated an adequate and independent state ground for its finding that the right to speedy trial carries through to sentencing: Article 2, § 24 of the Arizona Constitution. Petition, Appendix A at page 21a.

Even though the Arizona Court of Appeals found within the Sixth Amendment's speedy trial clause a right to a speedy sentence, its equal reliance on the Arizona Constitution's own speedy trial provisions constitutes adequate and independent state grounds that ought to prevent this Court from granting certiorari.

The Sixth Amendment extends to sentencing.

Burkett asserts the Sixth Amendment right to speedy trial extends through to sentencing. The Arizona Court of Appeals joined the great majority of jurisdictions when it agreed. Petition, Appendix A, at pages 17a-19a. The Arizona Court of Appeals adopted in this case the delay-of-trial test of Barker v. Wingo, 407 U.S. 514 (1972) (e.g., length of delay, reason for delay, defendant's assertion of right and prejudice to defendant) to screen claims of Sixth Amendment violations at sentencing.

The Barker factors have worked well for almost a quarter century. Their application to the last stage of the criminal proceeding, the sentencing, is a logical extension of what has been the law for a generation. Further, recognition of the Sixth Amendment's application to sentencing will fashion a useful device for the judicial toolbox, the better to administer congested courts and oversee sometimes recalcitrant prosecutors.

The Arizona Court of Appeals noted that a more than two-year delay occurred in Burkett's sentencing from the time when Arizona learned Burkett was in custody in New York State on an unrelated matter. Petition, Appendix A, at pages 2a-3a. Two years. For almost forty years, this Court has assumed arguendo that the ". . . sentence is part of the trial for purposes of the Sixth Amendment." Pollard v. United States, 352 U.S. 354, 361 (1957).

If the Court is inclined to grant certiorari, it is respectfully submitted it should do so in order to bring sentencing patently within the protections of the speedy trial clause of the Sixth Amendment.

CONCLUSION

As there appears to be no federal jurisdiction in this case, Burkett asks that Arizona's petition for a writ of certiorari be denied.

Dated this 20th day of December, 1994.

Respectfully submitted,

By

CAROL A. CARRIGAN
Deputy Public Defender
Maricopa County Public Defender
132 South Central Avenue, Suite 6
Phoenix, Arizona 85004
Telephone: (602) 506-8220

Counsel for **RESPONDENT**
State Bar No. 004252

CERTIFICATE OF SERVICE

CAROL A. CARRIGAN states the following under oath:

I served Gerald R. Grant and Diane E.W. Gunnels, the attorneys for the petitioner the State of Arizona, with one copy of the Brief in Opposition by delivering the copies to their office, on 20th day of December, 1994. They represent the only party required to be served.

By _____

CAROL A. CARRIGAN
Deputy Public Defender
Maricopa County Public Defender
132 South Central Avenue, Suite 6
Phoenix, Arizona 85004
Telephone: (602) 506-8220

Subscribed and sworn to before me this 20th day of December, 1994.

_____
Notary Public

My Commission Expires:

My Commission Expires Aug. 1, 1998